Supreme Court, U.S.
FILED
MAY 9 1997
OFFICE OF THE CLERK

No. 96-1671

In The

Supreme Court of the United States

October Term, 1996

FRANKLIN D. RAINES, et al.,

Appellants,

v.

ROBERT C. BYRD, et al.,

Appellees.

On Appeal From The United States District Court
For The District Of Columbia

BRIEF AMICUS CURIAE OF DAVID SCHOENBROD AND MARCI HAMILTON IN SUPPORT OF APPELLEES

*David Schoenbrod
New York Law School
57 Worth Street
New York, New York 10013
(212) 431-2339

Marci A. Hamilton
Benjamin N. Cardozo School
of Law
55 Fifth Avenue
New York, New York 10003
(212) 790-0215

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Line Item Veto Act violates Article I of the Constitution by delegating legislative lawmaking authority to the President.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

PERMISSION TO FILE BRIEF AS AMICI CURIAE .. 1

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE LINE ITEM VETO ACT IS UNCONSTITUTIONAL UNDER THIS COURT'S NONDELEGATION DOCTRINE 2

II. THE DISTRICT COURT BETRAYS THE CONSTITUTIONAL PRINCIPLE OF ACCOUNTABILITY UPON WHICH IT CLAIMS TO STAND 4

III. A BRIEF HISTORY OF CONGRESSIONAL DELEGATION AND THE NONDELEGATION DOCTRINE 8

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980) 14

A.L.A Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 12, 19

Byrd v. Raines, No. 97-0001, slip op. at 34-35 (D.C. Dist. Ct. Apr. 10, 1997) ..... *passim*

Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County, 1 Ohio St. 77 (1852) 5

Coyne Bheam, Inc. v. United States Food and Drug Administration, ___ F.Supp. ___, 1997 WL 200007 (M.D.N.C) 16

Field v. Clark, 143 U.S. 649 (1892) 5, 19

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 9

Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) 5, 7, 13, 15, 17

Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980) 14

J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928) 2, 3, 11, 12

Jordan v. De George, 341 U.S. 223 (1951) 13

Kent v. Dulles, 357 U.S. 116 (1958) 5

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) 11

Loving v. United States, ___ U.S. ___, 116 S. Ct. 1737 (1996) 5, 9, 18

Ludecke v. Watkins, 335 U.S. 160 (1947) 9

Mistretta v. United States, 488 U.S. 361 (1989) .. 2, 3, 13, 18

TABLE OF AUTHORITIES – Continued

Page

National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) 14

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) ...13, 17

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 12, 18

Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995) 9

Rock Royal Cooperative, 307 U.S. 533 (1939) 13

Smith v. Goguen, 415 U.S. 566 (1974) 13, 17

United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921) 11

United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624 (1995) 18

United States v. Rock Royal Cooperative, 307 U.S. 533 (1939) 14

Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924) 11

Yakus v. United States, 321 U.S. 414 (1944) 13

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 5

OTHER AUTHORITIES

U.S. Const. art. I § 1 .....4, 9

U.S. Const. art. I § 8 (spending and tax clauses) ...3, 4

2 U.S.C. § 691(a) 2, 3

5 U.S.C.A. §§ 801-08 18

H.R. 1036 (105th Cong., 1st Sess.) 16

TABLE OF AUTHORITIES – Continued

Page

S. 433 (105th Cong., 1st Sess.) 16

141 Cong. Rec. S4409-04 (March 23, 1995) 6

142 Cong. Rec. S2929-02 (March 27, 1996) 3

The Federalist No. 73 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961) 5

Henry Julian Abraham, *Justices and Presidents* (1974) 12

Robert Dahl, *Democracy and Its Critics* (1989) 15

David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993) 8, 9, 11, 17

Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* (1995) 10

Stephen Breyer, *The Legislative Veto After Chadha*, 72 Geo. L. J. 785 (1984) 15

Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477 (1994) 19

Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. (1977) 16

Antonin Scalia, *A Note on the Benzene Case*, 4 *Reg.* 25 (July -Aug. 1980) 16

Nick Smith, *Restoration of Congressional Authority and Responsibility for the Regulatory Process*, 33 Harv. J. on Legis. 323 (1996) 16

Paul Verkuil, *Comment: Rulemaking Ossification: A Modest Proposal*, 47 Admin. L. Rev. 453 (1995) 16

TABLE OF AUTHORITIES – Continued

Page

Battleground '94, Greenberg-Lake: The Analysis Group (1994) 6

Congressional Q. Weekly, April 12, 1997 5

Congressional Q. Weekly, Dec. 31, 1994 6

New York Times, March 29, 1997 17

Roll Call, April 17, 1997 17

With Our Readers, 13 Constitutional Review 98 (1929) 12

PERMISSION TO FILE BRIEF AS AMICI CURIAE

David Schoenbrod and Marci Hamilton file this brief as *amici curiae* in support of Appellees, pursuant to Sup. Ct. R. 37.2. A letter of the Appellant, dated May 7, 1997, and a letter of the Appellees, dated May 8, 1997, by which counsel for the parties evidenced their consent to the filing of this *amicus curiae* brief have been filed with this Court.

INTERESTS OF AMICI CURIAE

Professors David Schoenbrod and Marci Hamilton are law professors who specialize in constitutional and policy perspectives on legislative delegation. They are submitting this brief out of concern that the district court's reasoning eviscerates this Court's nondelegation doctrine even though it reaches the right result.[1]

SUMMARY OF ARGUMENT

Under this Court's existing nondelegation doctrine, the Line Item Veto Act is unconstitutional. The Act delegates lawmaking authority from the Congress to the President and in so doing provides no intelligible principle

[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* disclose that, while preparing this brief, they received compensation for assisting counsel for the American Petroleum Institute in preparing its *amicus* brief in this case. The views expressed in this brief are solely those of its authors, Professors Hamilton and Schoenbrod, and do not express the views of the American Petroleum Institute.

for the exercise of such delegated authority. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989), citing *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928).

The Line Item Veto Act is a transparent violation of the nondelegation doctrine that should be understood within the larger picture of the Constitution's rule against delegation. From a constitutional perspective, it is closely akin to the pervasive practice of agency delegation in which Congress avoids accountability by leaving the hard policy choices to unelected and unaccountable agencies.

The district court's opinion is untrue to the constitutional principle of accountability upon which its discussion purports to stand. This *amicus curiae* brief is being filed as a corrective to the opinion below. It explains why the Line Item Veto Act violates the nondelegation doctrine, provides an overview of the relevant constitutional landscape, and offers a brief history of congressional delegation and this Court's nondelegation doctrine.

ARGUMENT

I. THE LINE ITEM VETO ACT IS UNCONSTITUTIONAL UNDER THIS COURT'S NONDELEGATION DOCTRINE

Under this Court's existing doctrine, the Line Item Veto Act is an unconstitutional delegation of legislative lawmaking power. The Act permits the President to "cancel" any dollar amount of any discretionary budget authority, any item of new direct spending, and any limited tax benefit. 2 U.S.C. § 691(a). This cancellation

power is the functional equivalent of a legislative act, the repeal of a spending or tax statute. As such, the Act delegates to the President a legislative power that the Constitution vests solely in the Congress.

This Court has held that Congress may delegate legislative lawmaking power if a delegating statute provides an "intelligible principle" that guides the executive branch to carry out the will of Congress. *Mistretta v. United States*, 488 U.S. 361, 371-73 (1989), citing *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928). The Line Item Veto Act, however, provides no intelligible principle to guide the President. He is empowered to repeal an item if he finds that doing so would

(i) reduce the Federal budget deficit;
(ii) not impair any essential Government function; and
(iii) not harm the national interest.

2 U.S.C. § 691(a). The first requirement is a tautology and the second and third are all but contentless. These are not intelligible principles, but rather blatant prescriptions for independent executive branch lawmaking over the spending and taxing powers explicitly reserved to the Congress in Art. I. *See* U.S. Const., art. I, § 8 & § 7. As Senator Ted Stevens, who was the lead Senate negotiator of the Act in the Conference Committee, acknowledged, in filing the Conference Report, the Act is "the most significant delegation of authority by Congress to the President since the Constitution was ratified in 1789." 142 Cong. Rec. S2929-02, *2955 (March 27, 1996). In light of this Court's existing doctrine, a decision in this case to

invalidate the Line Item Veto Act can be quite straightforward.[2]

II. THE DISTRICT COURT BETRAYS THE CONSTITUTIONAL PRINCIPLE OF ACCOUNTABILITY UPON WHICH IT CLAIMS TO STAND

The district court based its ruling on the constitutional principle that Congress and the President, acting through the Article I legislative process, must be accountable to the voters for government's major policy choices. It stated, "The Line Item Veto Act . . . hands off to the President authority over fundamental legislative choices. Indeed, that is its reason for being. It spares Congress the burden of making those vexing choices of which programs to preserve and cut." *Byrd v. Raines*, No. 97-0001, slip op. at 34-35 (D.C. Dist. Ct. Apr. 10, 1997).

The ground rules of accountability in the United States are determined by the Constitution, which places federal lawmaking in the hands of elected representatives in two separate branches. Accordingly, Article I of the Constitution begins: "All legislative Powers herein granted shall be vested in a Congress" and specifies that there is only one path that a bill may take in order to become law. U.S. Const. art. I § (1). *See* U.S. Const. art. I § 7(2). All bills must be passed by the House and the Senate and presented to the President for approval before they may become law. *Id.* The President's only power to prevent a bill from becoming law is through veto of the

---

[2] Amici curiae take no position on the standing or ripeness issues addressed by the district court.

bill that has been presented by Congress. *Id.* The Constitution is remarkably and brilliantly clear on this essential point. *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 945 (1983) ("Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.").

The Framers believed that requiring the laws to be enacted by majorities in a bicameral legislature and then presented to the President would guarantee representative democracy and discourage intrusions on liberty that lack broad public support.[3] *See Loving v. United States*, ___ U.S. ___, 116 S. Ct. 1737, 1743 (1996), *Chadha*, 462 U.S. at 951; *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *The Federalist No.* 73 at 494-95 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961). Thus, this Court distinguishes " ' "between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." ' " *Loving*, ___ U.S. ___, 116 S. Ct. at 1744, quoting *Field v. Clark*, 143 U.S. 649, 693-94 (1892), quoting *Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852).

---

[3] Lead Appellee Senator Robert Byrd celebrated the district court's ruling in just these terms – as "a great day for the Constitution and the American people because it was their power – not mine – their power of the purse that was preserved." *Cong. Q. Weekly*, April 12, 1997 at 833.

The concept of a line item veto has gained momentum as a means of increasing congressional accountability. Thus, it has been popular with the voters.[4] Just as sensible consumers want itemized bills from shops, so do many voters want elected officials to take itemized responsibility for governmental spending. When Congress and the President lump many spending items together, they escape responsibility for the pork barrel items and so are free to engage in logrolling. The Constitution does not settle the question of whether bills should encompass only one item or bundle many of them together.[5]

---

[4] For example, when one poll asked whether the President should "have the authority to veto individual items in the federal budget," 64% responded yes, 31% responded no, and 5% had no opinion. ABC News, *ABC News Poll: Survey Beginning Jan. 3, 1995.* Of those sampled in another poll, 57% supported a "full line item veto which would require Congress to have a two-thirds vote to override the President's veto," 30% supported "a limited line item veto which would require only a simple majority vote in Congress in order to override the President's veto," while 8% opposed the veto and 5% were unsure. *Battleground '94,* Greenberg-Lake: The Analysis Group, (1994).

[5] It is reported that Appellee Senator Byrd has been a leading opponent of itemizing appropriations. For example, he used his official power to block for three years a clearly constitutional form of line item veto ("expedited rescission"). *Cong. Q. Weekly,* Dec. 31, 1994, at 3598. He has opposed a form of line item veto requiring Congress to vote item-by-item to override vetoes because spending items of interest to only one state lack the "national interest" needed to prompt an override. 141 Cong. Rec. S4409-04, *S4413 (March 23, 1995). Byrd supported expedited rescission in 1995 only as an alternative to a stronger version of the line item veto.

The Constitution does, however, dictate the process by which laws are made. Congress has no power to deviate from Article I. The district court appropriately invalidated the Act on the basis that it delegates to the President a legislative power (to repeal spending items and tax benefits) that Article I confers solely to the Article I legislative process. The court below rightly held that the Act violates the rule against delegation, stating that "cancellation is equivalent to repeal and 'repeal of statutes, no less than enactment, must conform with Art. I.' " Slip op. at 31 (quoting *Chadha*, 462 U.S. at 954.).

Yet, while employing the correct principle to invalidate the Line Item Veto Act, the district court attempted in dictum to jettison that principle as applied to delegation to agencies. The district court stated, "It has long been held that Congress may – indeed, of necessity, must – delegate vast authority to the Executive Branch of government to make and to change rules for the governance of national affairs, so long as they are in furtherance of the will of Congress." Slip op. at 29. This distinction cannot bear constitutional scrutiny.

While the threat to accountability posed by the Act is real,[6] the threat posed by delegation of lawmaking power

---

[6] The Act alters the lawmaking calculus in such a way that congressional accountability is decreased at certain points though increased at others. Under the Act, the President's canceling of items sets in motion an expedited process through which Congress considers whether to reenact some or all of those canceled. 2 U.S.C. § 691d(d), (e). The Act specifically allows Congress to do so by lumping them together instead of treating them individually. 2 U.S.C. § 691d. Thus, the Act increases somewhat Congress's responsibility for items that the

to agencies is massive and certain. Surely, the constitutional evil found in delegation to agencies is no less real than the constitutional evil correctly identified in the Line Item Veto Act. Such agency rulemaking is the functional equivalent of a legislative power just as is the cancellation power granted by the Act. In both the Line Item Veto Act and agency delegation, Congress shirks its constitutional responsibility to make the law by delegating to the executive branch important policy decisions. *See* slip op. 34-35. By delegating to agencies, Congress evades accountability for the laws imposed upon the public. David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993). The district court's reasoning, taken in no small part from the federal government's brief below (Memorandum of Points and Authorities in Support of Defendants' Alternative Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 19-23), seeks to save delegation to agencies but to strike delegation to the President.

III. A BRIEF HISTORY OF CONGRESSIONAL DELEGATION AND THE NONDELEGATION DOCTRINE

The Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress. . . . " U.S.

President cancels, but reduces its responsibility for the overall mix of items in the budget. Concomitantly, because it allows the President to strike specific items, the Act arguably increases the President's accountability.

Const. art. I, § 1. From the earliest days of the Constitution, there is ample evidence demonstrating that both the Framers and this Court believed that representatives should be required to make the hard policy choices and that the Court took the nondelegation doctrine seriously. *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388-89 (1813), *The Virginia Report of 1799-1800. Touching of the Alien and Sedition Laws. Together with the Virginia Resolutions of December 21, 1798*, at xv, 23 (Leonard W. Levy ed. 1970). *Ludecke v. Watkins*, 335 U.S. 160 (1947) (discussing Alien Act of 1789), Alexis de Tocqueville, *Democracy in America*, 57-58 (Phillips Bradley ed. 1946). *See also*, Schoenbrod, *supra*, at 30-33 (discussing examples from 18th and 19th centuries). The legislative power is to make rules of private conduct, as *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (Marshall, C.J.), made clear: "[it] is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Id.* at 136; *see also Loving*, ___ U.S. ___, 116 S. Ct. at 1744; *Plaut v. Spendthrift Farm, Inc.*, ___ U.S. ___, 115 S.Ct. 1447, 1455 (1995).

According to this understanding of Article I, Congress alone may make the rules that govern private persons and states. Congress can leave to other branches the interpretation and application of those rules, as well as functions that are not Article I legislative powers, such as the management of government departments and property. *See* Schoenbrod, *supra*, at ch. 12 (discussing the application of this test). Such a standard of unconstitutional delegation is consistent with the purposes of Article I. Branches other than the legislative will face hard

decisions in, for example, interpreting statutes and in exercising prosecutorial and remedial discretion; but it is the legislators who will have to face the hard legislative policy choices and take responsibility for their resolution. In stating rules of conduct, the legislature cannot simply promise the best of everything to everyone, but rather must make manifest the costs, as well as the benefits of its actions. *See, generally, id.* at 183-84, 186-89.

Before 1890, Congress did not routinely delegate its legislative powers. Around 1890, legislative practice began to change. According to an eminent historian, Professor Robert H. Wiebe, this shift sprang from basic changes in the economy and politics. Wiebe, *Self-Rule: A Cultural History of American Democracy* (1995). While power had previously resided principally in the institutions centered on the Main Streets of America, from 1890, nationally oriented institutions, such as nationally oriented businesses, unions, associations, and universities, took on increasing importance. *Id.* at ch. 6. These national institutions were run by a new managerial class, trained in what was thought of as scientific methods. *Id.* at 143. Its members believed that scientific managers should not have to account to lay people. *Id.* This class set out to insulate government from the lower class's influence by various devices, including poll taxes and literacy tests (applied to the lower class of all races) and the delegation of legislative power to expert agencies. *Id.* at 134-37, 164-65, 173-80, 206-07, 217-22.

Many members of this managerial class, however, did not think of the agencies as exercising legislative power because they differentiated expertise from policymaking. So infatuated was this class with science as the

universal solution to policy problems that it saw the agencies as following instructions rather than making law. For this reason, many zealous supporters of expert agencies could also think of themselves as supporting the separation of powers. Thus, from 1890 through the 1920s, as Congress started to delegate, the Supreme Court upheld some covert delegations on the basis that they gave the agencies the power to implement law rather than make it. Schoenbrod, *supra*, at 31-36 (listing cases).

It also invalidated some laws for delegating unconstitutionally. On at least three occasions prior to 1928, the Court struck statutes on delegation grounds. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924) (prohibiting Congress from delegating the "power to alter, amend or revise the maritime law" to states); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 87-88, 92-93 (1921) (holding that a vague statute "amounted to a delegation by Congress of legislative power to courts. . . . "). *Id.* at 86-87. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (holding improper delegation of maritime law to the states).

In 1928, this Court upheld a tariff statute under a new test: "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). The "intelligible principle" in that case provided only limited direction so that the statute, in fact, delegated legislative power. President-elect Herbert Hoover, a true believer in scientific government and also of separation of powers, reacted angrily:

> The American people will never consent to delegating authority over the tariff to any commission, whether non-partisan or bi-partisan. Our people have a right to express themselves at the ballot upon so vital a question as this.
>
> There is only one commission to which delegation of that authority can be made. That is the great commission of their own choosing, the Congress of the United States and the President. It is the only commission which can be held responsible to the electorate.

With Our Readers, 13 Constitutional Review 98, 100 (1929) (quoting speech of Oct. 15, 1928). An editorial in the Constitutional Review said the statute upheld in *Hampton* "was the most dangerous advance in bureaucratic government ever attempted in America." *Id.* at 101.

Despite the broad and troubling language of *J. W. Hampton*, it was used by this Court to invalidate New Deal laws that evidenced a tremendous increase in the scope of delegation. Justice Cardozo, concurring in a unanimous decision to strike the National Recovery Act, called it "delegation running riot." *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 553 (1935). The 9-0 and 8-1 votes in *Schechter*, 295 U.S. 295 at 551, and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935) emphasize the constitutional potential in the *J. W. Hampton* rule. However, Franklin Roosevelt's court-packing plan, and not intellectual persuasion, softened the Court's resolve to invalidate congressional delegations. Henry Julian Abraham, *Justices and Presidents* 198 (1974). While the "intelligible principle" test announced in *J.W. Hampton*, has been read appropriately to mean that Congress must state the rules of conduct, *Panama Refining Co.*, 293 U.S. at

421,[7] it has generally come to mean that it is sufficient for Congress to state only its goals even as it ducks the hard policy choices. *E.g., Mistretta*, 488 U.S. at 372-73; *Rock Royal Cooperative*, 307 U.S. 533, 574 (1939).

Still, the nondelegation doctrine has retained some vitality. Various coalitions of justices have struck particular agency laws. For example:

- *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976), struck down a statute for delegating to the Civil Service Commission the power to make a law preventing legal aliens from holding civil service jobs. *Id.* at 122 (Rehnquist, J., dissenting).

- *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) struck down hundreds of statutes that delegated to one or two houses of Congress the lawmaking power delegated by the Constitution to the Article I legislative process. *Id.* at 986-87 (White, J., dissenting).

- Void for vagueness cases not only require that the public be given notice of what is forbidden, but deny to executive officials the power to make the law. *E.g., Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).[8]

- Various cases have struck down city ordinances and state or federal statutes delegating overly broad discretion to regulate or punish speech or religion. *See generally* Laurence H. Tribe, *American Constitutional Law* §§ 12-38 (2d ed. 1988).

---

[7] See also, *Yakus v. United States*, 321 U.S. 414, 424-25 (1944).

[8] The void for vagueness doctrine applies to civil as well as criminal offenses, *Jordan v. De George*, 341 U.S. 223, 231, *reh'g denied*, 341 U.S. 956 (1951), and statutes that delegate to agencies often make violations of agency created laws a criminal offense.

- Various cases have interpreted statutes to avoid perceived delegation problems, although the net effect is that the courts made the legislative policy decisions not made by Congress. *E.g., Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646 (1980); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974).

Although this Court has struck agency laws on delegation grounds in many special circumstances, it generally affirms delegations in which Congress has not made the hard choices. *E.g., Mistretta*, 488 U.S. at 422 (Scalia J., dissenting); *United States v. Rock Royal Cooperative*, 307 U.S. 533, 574-76 (1939) (upholding statute that delegated authority to make regulations to create "orderly" markets while taking the interest of consumers into account). Thus, the main harm to representative democracy continues.

A variety of rationales have been advanced to justify delegation, none of which mitigate its constitutional defects. One rationale is that the agencies are experts, and Congress is not. Yet, the hard choices delegated are, at bottom, questions of policy rather than technical questions best resolved by experts. A leading political scientist, Professor Robert Dahl, argues that

> No intellectually defensible claim can be made that policy elites (actual or putative) possess superior moral knowledge or more specifically superior knowledge of what constitutes the public good. Indeed, we have some reason for thinking that specialization, which is the very ground for the influence of policy elites, may itself impair their capacity for moral judgment. Likewise, precisely because the knowledge of the

> policy elites is specialized, their expert knowledge ordinarily provides too narrow a base for the instrumental judgments that an intelligent policy would require.

Dahl, *Democracy and Its Critics* 337 (1989). Congress can call on technical advisors no less expert than those available to agency heads and willingly passes on technical questions when it is politically convenient to do so.

Another rationale for delegation is that it is a necessity of modern government because of the volume of work. This rationale is circular. By skewing legislators' political incentives, delegation encourages Congress to treat more and more issues in more and more detail through the federal bureaucracy. Although this bulking up of the regulatory state does not justify delegation, it must be faced in considering whether it can be ended. One sensible approach among others that Congress could take is described in an article by now-Justice Breyer in which he suggested that Congress could respond to the decision in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), by enacting a statute requiring that agency regulations be enacted through the legislative process rather than promulgated as agency rules. Stephen Breyer, *The Legislative Veto After Chadha*, 72 Geo. L. J. 785 (1984). He offered many variations on this approach, such as an expedited legislative process, *id.* at 793-94, which would take less time than judicial review of agency regulations. Justice Breyer's ideas have prompted bills by Congressman J.D. Hayworth and Senator Sam

Brownback. H.R. 1036 and S. 433 (105th Cong., 1st Sess.)[9] Another approach would be for Congress to take responsibility for at least the major rules. *See, e.g.*, Congressman Nick Smith, *Restoration of Congressional Authority and Responsibility for the Regulatory Process*, 33 Harv. J. on Legis. 323 (1996); Paul Verkuil, *Comment: Rulemaking Ossification: A Modest Proposal*, 47 Admin. L. Rev. 453, 457-59 (1995).

This Court has an equal constitutional responsibility to hold the line on delegation. As Justice Scalia wrote: "the argument may be made that in modern circumstances the unconstitutional delegation doctrine, far from permitting an increase in judicial power, actually reduces it. For now that judicial review of agency action is virtually routine, it is the courts, rather than the agencies, that can ultimately determine the content of standardless legislation." Antonin Scalia, *A Note on the* Benzene *Case*, 4 Reg. 25, 28 (July-Aug. 1980). *See also*, Carl McGowan, *Congress, Courts, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1120 (1977).[10] Content review rather than nondelegation review puts the Court directly in the center of controversial policy decisions such as the recent or pending White House proposals for the Food and Drug Administration to regulate tobacco, *Coyne Bheam, Inc. v. United States Food and Drug Administration*, ___ F.Supp. ___, 1997 WL 200007 (M.D.N.C), the Federal Election

---

[9] So far, the bills have 39 sponsors in the House and eight in the Senate, including Senate Majority Leader Trent Lott.

[10] Judicial deference to agency lawmaking reduces judicial policy making, but only at the price of making even more fictional the notion that the agency is directed by statute.

Commission to enact the McCain-Feingold campaign finance reforms by promulgating a rule (*Clinton Considers Pushing Election Panel on Soft Money*, New York Times, March 29, 1997 at 11), or the Federal Communication Commission to require television stations to provide free air time for candidates (FCC Gets Ready to Force Free TV Issue, Roll Call, April 17, 1997 at 1). By enforcing the nondelegation doctrine, this Court would in fact reduce its involvement in matters properly left to the legislative process.

The truth is that this Court has enforced the nondelegation doctrine selectively and inconsistently. Justices with diverse viewpoints have often expressed concern that the Court's nondelegation doctrine is contradictory. *See e.g., Smith v. Goguen*, 415 U.S. 566, 591-604 (1974) (Rehnquist, J., dissenting); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 112 (1976) (Rehnquist, J., dissenting); *American Petroleum Institute*, 448 U.S. at 717-18 n.30 (Marshall, J., joined by Brennan, White, and Blackmun, J.J., dissenting); *National Cable Television Ass'n*, 415 U.S. at 352-54 (Marshall, J., joined by Brennan, J., dissenting); *Chadha*, 462 U.S. at 986-87 (White, J., dissenting); *see also* Schoenbrod, *supra*, at 40-45, 181. The lower court's opinion would deepen the selectivity and inconsistency in nondelegation jurisprudence – by overturning the Line Item Veto Act but acquiescing in a weakly applied doctrine in the agency delegation context. This case offers the Court the opportunity to place its nondelegation doctrine on a more internally consistent and less political plane.

The burden of upholding the Constitution is not the Court's alone. The Congress has a constitutional obligation as strong as the Court's to keep delegation in line. As

Justice Kennedy, joined by Justice O'Connor, stated in his concurring opinion in the decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 1639 (1995):

> [I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.
>
> At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role.

Thus, the Congress has rightly stepped forward to begin to grapple with the delegation problem with recently enacted legislation (5 U.S.C.A. §§ 801-08 (1996, Supp. 1997) (expedited congressional review of agency rules)) as well as the pending legislative proposals previously discussed. On the Court's side, this Court's decision in *Lopez* and its discussion of delegation in *Loving* signal the Court's appropriately increasing readiness to provide meaningful boundaries to the limited powers accorded Congress in Article I.

In principle, this Court has always agreed that Article I limits the power of Congress to delegate its responsibility to make the law. *Loving*, ___ U.S. ___, 116 S. Ct. at 1744; *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935);

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-30 (1935); *Field v. Clark*, 143 U.S. 649, 692 (1892); *see also* Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorney-ship Model of Representation*, 69 N.Y.U. L. Rev. 477, 544-54 (1994) (discussing independent decisionmaking responsibility of legislators). The people, no less than Congress, have a right to hear the Court explain how the Constitution requires Congress and the President to be accountable by taking responsibility for the laws that government imposes on the public. This Court should continue its commitment to this core structural constitutional requirement by clarifying and buttressing the nondelegation doctrine in this case.

CONCLUSION

Article I of the Constitution prevents Congress from abdicating its responsibility to make the hard policy choices. If the Court fails to invalidate those laws in which Congress abdicates its central constitutional role, this Court will have deprived the people, the States, and the Congress of the guidance necessary to bring legislative practices within the constitutional fold. Accordingly, *amici curiae* urge this Court to hold that the Line Item

Veto Act is an unconstitutional transfer of lawmaking authority from the Congress to the President.

Respectfully submitted,

DAVID SCHOENBROD
MARCI A. HAMILTON

*DAVID SCHOENBROD
New York Law School
57 Worth Street
New York, New York 10013
(212) 431-2339

MARCI A. HAMILTON
Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, New York 10003
(212) 790-0215

**Counsel of Record*